No. 20227

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED COLEMAN, ET AL.,

APPELLANTS

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEE

EDWIN L. WEISL, JR.,
Assistant Attorney General.

MANUEL L. REAL,
United States Attorney,
Los Angeles, California, 90012.

ERNESTINE TOLIN,
Assistant United States Attorney,
Los Angeles, California, 90012.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

I N D E X

CITATIONS

Cases:

Cases cont'd:

Statutes:

IN THE UNITED STATES COURT OF APPEALS

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No. 20227

ALFRED COLEMAN, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEE

OPINION BELOW

The district court did not enter an opinion.

JURISDICTION

This is an appeal from a summary judgment entered on February 26, 1965, awarding the United States the right of possession of certain property and a final judgment entered May 12, 1965, in favor of the United States, also assessing damages. This action was instituted by the United States to eject the

appellants from certain invalid placer mining claims located for building stone on 720 acres in the San Bernardino National Forest in California. Jurisdiction of the district court was invoked under 28 U.S.C. sec. 1345. Notice of appeal was filed June 3, 1965. The jurisdiction of this Court rests on 28 U.S.C sec. 1291.

QUESTION PRESENTED

Whether the district court, in granting the United States' motion for summary judgment on the issue of ejectment, thereby giving effect to the decision of the Secretary of the Interior, declaring the appellants' mining claims to be null and void, correctly applied the proper standard of review.

STATUTES INVOLVED

30 U.S.C. sec. 161 provides:

> Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this section. Nothing contained in this section shall be construed to repeal section 471 of Title 16 relating to the establishment of national forests.

30 U.S.C. sec. 611 provides:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

28 U.S.C. sec. 1361 provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

STATEMENT

This action was instituted by the United States by the filing of a complaint on August 8, 1963, seeking the ejectment of the appellants from some 720 acres of land within the San Bernardino National Forest, California. Damages were also sought in the amount of the reasonable rental value of the lands occupied and the value of the materials removed.

The subject acreage had been occupied by the appellants as a mining property consisting of 18 placer mining claims. The validity of the mining claims, which covered an extensive area of quartzite rock, was challenged by the Department of the Interior, which instituted contest proceedings at the request of the Forest Service, and proceedings were conducted by a hearing examiner. The hearing examiner found five of the mining claims to be valid and the other 13 to be invalid. The Acting Director of the Bureau of Land Management sustained the validity of three claims and part of a fourth. The Secretary of the Interior, acting through his Deputy Solicitor, in considering the appeal taken by Mr. Coleman, reviewed in detail the evidence introduced at the

hearing on the contests. The Deputy Solicitor rendered a decision declaring all of the subject mining claims to be null and void for the reason that a valid discovery had not been made. United States v. Alfred Coleman, A-28557, March 27, 1962 (App. p. 28).

The Deputy Solicitor's decision in pertinent part held as follows: A mining claimant is entitled to a patent to his mining claim if he has made a discovery of a valuable mineral deposit within the limits of his claim. The Act of August 4, 1892, 30 U.S.C. sec. 161, supra, expressly authorized the location of mining claims for building stone. It was, therefore, essential that the appellants herein show that they had made a discovery of building stone within the limits of their claims. A validating discovery is shown by reasonable evidence of a finding of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). When the mineral claimed as a discovery is one of wide occurrence, to be

considered as a valuable mineral it must be shown that it can be extracted, removed and marketed at a profit. Since Congress withdrew common varieties of building stone from location under the mining laws on July 23, 1955, 30 U.S.C. sec. 611, it was incumbent upon the appellants to show that the building stone could have been extracted, removed, and marketed at a profit prior to the date it was withdrawn from location.

The decision of the Deputy Solicitor recites that the appellant Coleman admitted that he had made no profit on his rock sales. The testimony given by the Government's mineral examiner and a producer and distributor of stone was also found to constitute a prima facie showing of invalidity. The burden of showing by a preponderance of the evidence that each of his claim was validated by a discovery of a valuable mineral deposit within its boundaries was held to be upon the appellants.

It was the conclusion of the Deputy Solicitor that the evidence presented on all pertinent factors did not support a conclusion that prior to July 23, 1955, the deposit upon which the claim of discovery was based could have been mined, removed

and disposed of at a profit. Consequently, all of the subject mining claims were held to be null and void. The earlier decisions had declared that work had been done in good faith and that there was established a limited market as to four or five of the claims. The appellants did not seek to obtain judicial review of this decision.

The United States, on August 8, 1963, filed a complaint seeking the ejectment of the appellants from their invalid mining claims and damages, to which the appellants filed an answer and counterclaim alleging that all the claims were valid and asking issuance of a patent. The United States, on July 16, 1964, filed a motion for summary judgment on the issue of ejectment only and for dismissal of the counterclaim. Appellants, on August 18, 1964, filed a statement of genuine issues necessary to be litigated and an answer and opposition to the plaintiff's motion for summary judgment. A reply memorandum to the appellants' statement of genuine issues was filed by the United States on August 19, 1964. An opposition to the United States' motion to

strike portions of defendants' answer and opposition to plaintiff's motion for summary judgment was filed August 20, 1964.

The district court, by order entered December 7, 1964, denied the United States' motion for summary judgment and dismissal of the counterclaim. This was done on the basis of the appellants' assertion at the argument that the Department of the Interior has secret instructions or regulations regarding cases such as this. The district court stated that the "Plaintiffs' failure to meet this assertion leaves a question of fact before the court which precludes a summary judgment at this time. The United States filed on January 13, 1965, a motion for resubmission of their motion for summary judgment on the issue of ejectment only and for dismissal of the counterclaim which had previously been filed on July 16, 1964. Supporting this motion was an affidavit of an official of the Department of the Interior to the effect that there were no secret instructions or regulations of any kind affecting the action taken in mining contest cases generally or in this case. The certified record of the administrative proceedings in the subject contest had been lodged with the court on July 16, 1964.

On January 25, 1965, the appellants filed an answer and opposition to the motion for resubmission filed by the United States. The United States filed a reply to this answer on January 28, 1965. Appellants filed a further answer and opposition to the United States' motion on February 5, 1965.

On February 26, 1965, the district court, after hearing oral argument and considering the files, records and evidence in the case, "including the entire certified record of the administrative proceedings, here lodged with the Court * * *," found that the United States had the right to have judgment summarily entered in its behalf as a matter of law.[1/] The district court declared the United States to be the sole owner of all right, title and interest in the lands which are the subject of this suit. The appellants' counterclaim was also dismissed. On March 5, 1965, the appellants filed a motion to amend or alter judgment, together with a motion for a new trial.

1/ The files, especially defendants' "Further Answer and Opposition to Plaintiff's Motion For Re-Submission of Motion for Summary Judgment" show that this alleged secret regulation is simply another form of the argument which this Court rejected in Adams v. United States, 318 F.2d 861 (1963), that the standard for validation of mining claims set out in Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959), was erroneous. See also Henrikson v. Udall, 350 F.2d 949 (C.A. 9, 1965).

The United States filed oppositions to the appellants' motions on March 12, 1965, which were replied to by the appellant on March 19, 1965. On May 12, 1965, final judgment was entered in favor of the United States. The provisions of this judgment incorporated the provisions of the previously entered judgment on the issue of ejectment and awarded as damages the sum of $1,877.50. Notice of appeal was filed on June 3, 1965.

SUMMARY OF ARGUMENT

The Secretary of the Interior, in matters relating to the public domain, is charged by Congress with the responsibility of seeing that rights in the public lands of the United States are acquired in accordance with the statutory provisions which provide for their disposal. The disposal of public lands is not a subject over which the "judicial power" of the United States is extended. It is a field in which the authority of Congress is supreme.

The Department's decision, holding the appellants' mining claims to be null and void, was in accord with established

law. The requirement of present marketability as related to common variety minerals is clearly in accord with decisions of the Secretary and the courts. The fact findings of the Department are supported by the record and are conclusive.

There is nothing here which suggests that the requirements of due process have not been complied with. Moreover, since a direct review of the Secretary's decision would have been confined to a review of the administrative record no broader review is permitted by bringing a collateral attack on the Department's decision in ejectment proceedings.

This case was properly disposed of by summary judgment.

ARGUMENT

APPELLANTS' ATTACKS UPON THE DEPARTMENTAL DECISION INVALIDATING THEIR MINING CLAIMS LACK MERIT

In order to obtain possession of its property the United States instituted this action to eject the appellants from certain mining claims which had been determined by the Secretary of the Interior to be invalid. The Secretary's determination that the appellants' mining claims were invalid was challenged by the appellants in opposing the ejectment proceeding. Except for such challenge, the United States plainly was entitled to possession of its property. United States v. Langendorf, 322 F.2d 25 (C.A. 9, 1963); Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965).

A. The decision declaring the appellants' mining claims to be invalid was within the Secretary's jurisdiction. - The basic case of Cameron v. United States, 252 U.S. 450, 459-460 (1920), dealing with mining claims, declares:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. (Citations omitted.)

> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void.

This Court spelled out the function of the Secretary, volving an alleged grant to a state, in Standard Oil Co. of lifornia v. United States, 107 F.2d 402, 409-410 (1940), cert. ., 309 U.S. 654, as follows:

> The disposal of the public lands is not a subject over which the "judicial power" of the United States is extended. It is a field in which the authority of the Congress is supreme. Lee v. Johnson, 116 U.S. 48, 6 S.Ct. 249, 29 L. Ed. 570; Art. IV, sec. 3, clause 2, of the Constitution, U.S.C.A. Where Congress grants public lands to a state, reserving those known to

be mineral as of the approval of the survey, it is thought that there is no constitutional impediment to its delegating to any instrumentality it may select the authority of determining, as a fact, what lands fall within the excluded class. Compare Shields v. Utah & Idaho R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111. The state or its transferees obviously have no constitutional right to demand the property on terms differing from those imposed. Their claim to the land does not derive from the Constitution. Nor is the power of Congress, under the broad authorization of that document, so limited as to require the fact-finding agency to make its determination at or prior to the approval of survey.

The problem, then, as we understand it, is not what authority Congress may confer upon the Secretary, but what authority it has conferred in relation to the administration of this grant. If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition. The holdings to this effect are too numerous for citation, but among those apposite are Catholic Bishop of Nesqually v. Gibbon, 158 U.S. 155, 15 S.Ct. 779, 39 L.Ed. 931; Cameron v. United States, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659; St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636, 26 L.Ed. 875; Wright v. Roseberry, 121 U.S. 488, 7 S.Ct. 985, 30 L.Ed. 1039; Burke v. Southern Pacific R. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527; Johnson v. Drew, 171 U.S. 93, 99, 18 S.Ct. 800, 43 L.Ed. 88.

Jurisdiction of the Department to determine the validity of appellants' mining claims is plain.

B. The Department's decision declaring the subject mining claims null and void was in accord with established law. - The rule is well established that, under the mining laws of the United States, the discovery of a "valuable" mineral deposit within the limits of each claim is essential to a valid location. Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Mining Company, 371 U.S. 334 (1963); Adams v. United States, 318 F.2d 861 (C.A. 9, 1963); Davis v. Nelson, 329 F.2d 840 (C.A. 9, 1964).

It was necessary for the appellants to establish that a discovery had been made of a "valuable" mineral, i.e., stone, within the boundaries of each mining claim prior to July 23, 1955, in order for the claims to be valid locations. After that date, common varieties of sand, gravel and stone could not provide the mineral basis for a valid claim. Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. secs. 601, 611 (supra, p. 3). Since the general mining laws relate only to "land valuable for minerals" (30

U.S.C. sec. 21), or which have "valuable mineral deposits" thereon (30 U.S.C. sec. 22), the burden was on the locator in this instance of showing the existence of a valid discovery of stone within the limits of the subject claims prior to the date that they ceased to be locatable minerals. Foster v. Seaton, 271 F.2d 836 (C.A. D.C. 1959).

The test to be applied in determining whether minerals are valuable within the meaning of the mining laws of the United States was recently pointed out in Best v. Humboldt Mining Company, 371 U.S. 334, 335-336 (1963), and this Court expressed it in Adams v. United States, 318 F.2d 861, 870 (1963), as follows:

> The showing which must be made with respect to value in order to establish a valid claim, as stated in Castle v. Womble, 19 L.D. 455, 457, and thereafter given recognition by the Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322, 25 S.Ct. 468, 470, 49 L.Ed. 770, is as follows:
>
> > "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *"

The appellants herein have argued that there has been retroactively applied a new concept in determining the validity of a discovery. This is not so. The question still remains whether "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." It cannot be denied that the cost of extraction, which is but one element limiting profit, is relevant to determining whether "a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed." Adams v. United States, 318 F.2d 861, 870 (C.A. 9, 1963). This Court again affirmed this standard in Henrikson v. Udall, 350 F.2d 949 (1965). Indeed, it is difficult to see how a reasonably prudent man could have such an expectation without considering whether the mineral could be marketed at a profit. To hold otherwise would permit the establishment of rights in the public domain without any reasonable prospect of development, which would be contrary to the stated purposes of the mining laws. Those laws do not contemplate private "banking" of lands for future development and for use of the mining laws as a subterfuge to get title and use the lands for other purposes.

The requirement of present marketability as related to common variety minerals is clearly in accord with the rule announced in Castle v. Womble, 19 I.D. 455 (1894). It is obvious that a person of ordinary prudence would not be justified in the further expenditure of his labor and means in developing a source of stone where there was no present market for the amount claimed and the cost of removal exceeded the return from its sale. In Foster v. Seaton, 271 F.2d 836, 838 (C.A. D.C. 1959), the court stated:

> With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956). * * *

In this case, the burden of proof was on the appellants to show the existence of a valuable mineral discovery within the limits of their mining claims. Foster v. Seaton, 271 F.2d 836, 838 (C.A. D.C. 1959). This they failed to do.

C. The Department's findings of fact are supported by the record and are conclusive. - A review of the record of this case clearly shows that the appellants failed in their burden of showing that they had made a valid discovery on the subject mining claims prior to July 23, 1955. The Secretary, after reviewing the administrative record, found that the appellant, Mr. Coleman, had admitted that he had made no profit on his sales of rock. He also found that there was a great disparity between the mineral claimants' estimate of the value of the mineral actually marketed from the claims and the cost of doing so, which also indicated the absence of any element of profit. In addition, there was the testimony of the Government's mineral examiner, describing an examination of the claims in Coleman's company and his sales records, and that of a producer and distributor of stone products, describing the market for stone in the

area. This testimony of the United States' witnesses, the Department found was sufficient to constitute a prima facie showing of invalidity of all of the appellants' claims.

But, apart from the supporting evidence, whether there has been the requisite discovery of a valuable mineral within the limits of the subject mining claims is a question of fact, the decision of which by the Secretary of the Interior, or his authorized representative, is conclusive in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Company, 371 U.S. 334, 335-336 (1963); Standard Oil Co. of California v. United States, 107 F.2d 402 (1940).

This Court in Standard Oil Co. of California v. United States, supra, an analogous situation to the present action, fully treated the issue presented by this appeal. The United States, in that case, had instituted a suit to quiet title to certain lands on the basis of a factual determination which had been made by the Secretary of the Interior. The Secretary had determined

that certain lands were known to have been valuable for minerals at the date of their survey and that, as such, title had not passed to the state with a grant of public lands. This Court, after holding the Department to be conclusive as above quoted (p. 14), further held (107 F.2d at p. 410):

> Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises must be exercised within the limits of due process, that is, after notice and hearing and upon evidence. Cameron v. United States, supra; Crowell v. Benson, supra; Shields v. Utah & Idaho R. Co., supra. Compare Iron Silver M. Co. v. Campbell, 135 U.S. 286, 10 S.Ct. 765, 34 L.Ed. 155. But there is here no question of due process. Appellants participated in the proceeding before the department and make no complaint that they were not accorded full opportunity to present their evidence.

In Cameron v. United States, 252 U.S. 450 (1920), which was an action brought by the United States to enjoin a mining claimant from occupying a tract of land under a claimed mining location, the COURT held (p. 464):

> Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the

> Interior was conclusive in the absence of fraud or imposition, * * *. [Citations omitted.] Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below.

The departmental decision in this instance, was on a factual question and is the same type of situation as was presented in Cameron. There has been no allegation of fraud made in this case. Appellants presented all the evidence they desired. No mention of procedural due process appears. As noted in the Statement, supra, p. 8, their claim of "secret instructions" was another of their refusals to accept the standards approved in Adams and Foster. There is no relevant distinction which can be made between this case and Cameron.

The appellants' challenge of the departmental decision in this action is similar to a collateral attack being made on a judgment. Instead of bringing an action in the nature of mandamus in the local district court under 28 U.S.C. sec. 1361,

upra, to review the decision, the appellants took no action to hallenge in the courts the determination that their mining laims were null and void. Instead, over a year after the de- ision, the United States was compelled to bring this suit to ake the decision effective. The mandamus review, which the ppellants did not avail themselves of, is that "direct review" eferred to by this Court in Adams v. United States, 318 F.2d 61 (1963). This Court stated at p. 867:

> Indeed, in a court proceeding other than a direct review, the district court function would probably be more limited. See, for example, Cameron v. United States, 252 U.S. 450, 464, * * *.

nd in Henrikson v. Udall, 350 F.2d 949, 950 (1965), this Court riefly stated the standard of review in direct review proceed- ngs to be followed:

> It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed. [Citations omitted.]

D. Summary judgment was properly granted in this Court. - The appellants argue that a motion for summary judgment was not necessary in this case and that this should have been heard in the district court in a manner provided for in Section 1009 of the Administrative Procedure Act, Title 5 U.S.C., particularly sub-section (e). The simple answer to this argument is that the appellants did not pursue their remedy. The United States was required to institute this action due to the appellants' failure to seek review of the Deputy Solicitor's decision in the courts.

Even if the appellants were to have sought a review in the courts, they are not entitled to a review under the provisions of the Administrative Procedure Act. That Act was designed to affect administrative agencies whose functions are of a regulatory nature, unlike the Department of the Interior, which has long been charged with the care, management, and disposition of the public lands, including mineral lands, where the extent of private rights, if any, depends solely on grants from Congress.

See 2 Stat. 716, 5 U.S.C. sec. 485; 9 Stat. 395, 43 U.S.C. sec. 2; and 30 U.S.C. sec. 22; Best v. Humboldt Mining Company, 371 U.S. 334 (1963).

Decisions of the Secretary of the Interior with respect to public lands have historically been accorded a conclusiveness beyond that of typical regulatory agencies. Cameron v. United States, 252 U.S. 450, 464 (1920). See also Morgan v. Udall, 306 F.2d 799 (C.A. D.C. 1962), where the court stated with citations (p. 801): "It has long been established that the determination by the Secretary of a question of fact on a matter within his jurisdiction is well-nigh conclusive."

Nothing in the Administrative Procedure Act indicates an intention to narrow the broad powers of the Secretary of the Interior in public land matters or to enlarge the power of the courts in reviewing his decisions. To the contrary, the "plenary authority" of the Secretary in such matters was recently affirmed by the Supreme Court in Best v. Humboldt Mining Company, 371 U.S. 334 (1963), the Court stating at p. 336:

> * * * the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them.

After quoting from Cameron to demonstrate the Secretary's power to declare mining claims null and void, the Court, at page 338, expressed its views on hearings before the Department as follows:

> "Due process in such case implies notice and a hearing. But this does not require that the hearing be in the courts, or forbid an inquiry and determination in the Land Department." Orchard v. Alexander, 157 U.S. 372, 383. If a patent has not issued, controversies over claims "should be solved by appeal to the land department and not to the courts." Brown v. Hitchcock, 173 U.S. 473, 477. And see Northern Pacific R. Co. v. McComas, 250 U.S. 387, 392.

As this Court again held in Henrikson v. Udall, 350 F.2d 949 (C.A. 9, 1965), direct review is confined to the administrator; hence, this case must be disposed of by summary judgment. See also Dredge Corporation v. Penny, 338 F.2d 456 (C.A. 9, 1964). Certainly no broader review is permitted in a collateral attack of the Department's decisions than in ejectment proceedings brought by the United States.

CONCLUSION

For the foregoing reasons, we submit that the judgment should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

MANUEL L. REAL,
United States Attorney,
Los Angeles, California, 90012.

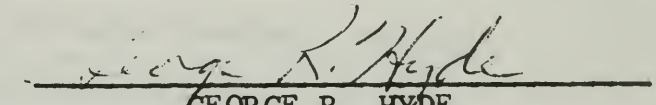
ERNESTINE TOLIN,
Assistant United States Attorney,
Los Angeles, California, 90012.

ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

JANUARY 1966

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



GEORGE R. HYDE
Attorney, Department of Justice
Washington, D. C., 20530

APPENDIX

UNITED STATES
V.
ALFRED COLEMAN

A-28557 Decided MAR 27 1962

Mining Claims: Common Varieties of Minerals--Mining Claims: Discovery--Mining Claims: Determination of Validity

To satisfy the requirement for a discovery on a building stone claim located before July 23, 1955, it must be shown that the exposed materials, a common variety of stone, appearing within the limits of a claim could have been extracted, removed, and marketed at a profit prior to that date, and where such a showing is not made the mining claim is properly declared null and void.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

A-28557

United States

v.

Alfred Coleman

: Contest No. 6833 (Los Angeles); mineral patent application, Los Angeles 0137951.

: Placer mining claims held valid in part and null and void in part.

: Affirmed in part; reversed in part.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred Coleman has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated June 22, 1960, which modified a hearing examiner's conclusion holding null and void 13 of the 18 placer mining claims and holding the remaining 5 claims to be valid. The Acting Director held an additional claim and 20 acres of another, null and void, thus sustaining the validity of only 3 claims and part of a fourth claim.

The claims, which comprise 720 acres situated in the dry bed of Baldwin Lake and on an adjoining steep mountain, are in the San Bernardino National Forest in California. They were located for quartzite which outcrops on all the claims and is thought to extend 1000 feet below the surface. The claims, designated as the Baldwin Lake Quarry Claims Nos. 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, were located and relocated in the

period 1949-1955. Application for patent was filed in January 1956, and on February 25, 1958, a contest was commenced on charges that the land in the claims is nonmineral; that minerals had not been found in sufficient quantities to constitute a valid discovery; and that $500 had not been expended in improvements on claims 7, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19. A hearing was held on September 16, 1958.

At the hearing, Coleman testified that he had devoted all of his time and effort to development of the claims during the 10 years since the location. He said, however, he felt that proper development would require removal of rock from the top of the mountain downward and, therefore, he had devoted his efforts to the construction of a home which would permit him to live on one of the claims, to the development of sewage disposal facilities and a water supply for domestic use and for quarrying and processing operations at a later time, and to the building of roads to provide access to the higher claims. He used weathered rock fragments in the construction of his house and in fencing the area of the spring and for fill in the dwelling area. He sold an estimated 1000 tons over the 10-year period, but did not attempt to commence active quarrying operations although he installed some rock processing equipment. He said that he needed title to all of the claims to be able to provide a complete range of colors of ornamental rock for construction use and as security for loans that he might need

in the future, as well as for proper development of the claims. He said he did not want to attempt extensive sales until he was fully equipped to offer a wide selection of colors and certain delivery. Shortly before the hearing, he entered into a lease permitting his lessee to process and dispose of sand, gravel and other severed rock products not including building stone. The lessee testified that he installed his own equipment and that he sold in excess of $4000 worth of sand, gravel, lateral rock for septic tank leaching fields and fill material in the first 2½ months of operations under the lease.

Coleman did not controvert the charge that less than $500 worth of work had been done on many of the claims, but he contended that the requirements of the mining laws had been met by the placing on some of the claims of extensive improvements which are of value to all of them. On cross examination, he gave what he termed as wild estimates of the value of the improvements placed on and of the materials removed from all of the claims. His total valuation for improvements on the 18 claims was $17,200; for materials removed $15,990. He admitted that the improvements on 11 of the claims did not exceed $150 in value. He claimed $1500 on 3 claims, $4000 for roadwork on one claim; and $6500 for his combined home, garage and shop on one of the claims. On the remaining 2 claims, he gave values of $200 and $750. He also admitted no removals of rock or rock products from 6 of the claims; removals valued at $60 from one claim;

rom $100 to $120 from 3 claims; $240, $250 and $350 from 3 others; 1350, $1500 (from each of 2 claims) and $2000 from 4 more; and 8400 from one over the 10-year period.

The government's witnesses testified that there are large uantities of quartzite of various colors on the claims and in the rea of 28,000 acres of which the claims are a part; that such rock an be used for construction purposes; that there is not a great emand for it because it is very heavy and, therefore, expensive o handle; that it splits unpredictably so that there is a great eal of waste which can be utilized for gravel only with considerable xpense for crushing because of its hardness; and that it cannot be split into thin layers for facing and surfacing, which greatly increases the weight of the quantity of material required for covering a given area over the requirements for other accessible rock. Coleman's estimate of sales amounting to $12,000 over a 10-year period was not questioned, nor his report of sales amounting to $1025 in 1957, but a government's witness stated that he felt that the roads on the claims evidenced lesser values than Coleman claimed. He concluded that the possible demand for rock from the claims and the evident increasing difficulty of producing disposable rock as the more usable fractions are removed could not justify a prudent man in spending time and money with a reasonable chance of success in developing a valuable enterprise.

The hearing examiner summarized all of the evidence presented at the hearing, noting the very widespread occurrence of the stone claimed as a discovery, the limited potential market and the paucity of the claimant's sales. He concluded, however, that the Colemans 1/ had "established a limited market for the types of building stone found upon their claims" and had in good faith developed claims numbered 1, 4, 5, 8 and 10. He, therefore, declared these 5 claims validated by discovery and the 13 other claims null and void. On appeal, the Acting Director noted that Coleman's sales have not afforded him any recompense for his continuous labor over a 10-year period, but concluded that there is a market for a limited amount of building stone from 3 claims and a portion of one other claim that are most fully developed, and from which the bulk of his sales have been made, so that continued sales at the rate shown for the first 10 years of operations will produce a profit over and above the value of Coleman's labor in removing the stone from these claims. Accordingly, he approved the examiner's judgment as to a valid discovery on claims numbered 1, 5, 8 and the portion of No. 10 described as the $N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$ of section 7, T. 2N., R. 2 E., S. B. M. He added claim No. 4 and the west one-half of claim No. 10 to the list of null and void claims.

1/ The contest was brought against Mr. and Mrs. Coleman but Mrs. Coleman died while the appeal was pending before the Director.

In its successive appeals from the validation of some of the claims, the Forest Service has contended that there has been no discovery of a valuable mineral deposit on any of them because of Coleman's inability to sell anything removed from the claims at a price which includes the reasonable value of his labor. It points out that because the claims are located in a national forest, the evidence of their validity should be clear and unequivocal, citing the Department's decision in United States v. Duvall, 65 I. D. 458, 661 (1958).

In his appeals, Coleman contends that the charges against his claims of nonmineral land and no discovery have no validity in view of the 720 acres of solid rock fully exposed to view and that his evidence of improvements shows clearly that sufficient expenditures have been made on some of the claims for the benefit of all of the claims. He urges that the charges be dropped and that the land office conclude the patent proceedings without further delay.

It is well-established that a mining claimant is entitled to a patent to his mining claim if he has made a discovery of a valuable mineral deposit within the limits of the claim (30 U. S. C., 1958 ed., secs. 23, 35). The act of August 4, 1892 (30 U. S. C., 1958 ed., sec. 161), expressly authorizes the location of mining claims for building stone. Therefore, it was essential in this contest that Coleman show that he has made a discovery of building stone within the limits of his claims. This Department held early

In the history of proceedings under the mining laws that a validating discovery is shown by reasonable evidence of a finding of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (Castle v. Womble, 19 L. D. 455 (1894)), and this standard has been sanctioned by the courts. Chrisman v. Miller, 197 U. S. 313 (1905); Cameron v. United States, 252 U. S. 450 (1920); Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959). When the mineral claimed as a discovery is one of wide occurrence the Department has held that the characterization of a deposit of such material as a valuable mineral is dependent upon a showing that it can be extracted, removed and marketed at a profit. Layman et al. v. Ellis, 52 I. D. 714 (1929); United States v. Barngrover et al., 57 I. D. 533 (1942); see also Ickes v. Underwood, 141 F. 2d 546, 549 (D. C. Cir. 1944). To justify his possession of public land, the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, a deposit of materials such as building stone or sand and gravel is of such value that it can be processed, removed and disposed of at a profit. Solicitor's opinion, 54 I. D. 294, 296 (1933); United States v. Strauss et al., 59 I. D. 129 (1945); United States v. Foster et al., 65 I. D. 1 (1958), aff'd Foster et al. v. Seaton, supra. See also United States v. Estate of Hanny, 63 I. D. 369,

373 (1956); United States v. Black, 64 I. D. 93, 96 (1957); United States v. Fife et al., A-28386 (September 19, 1960).

Furthermore, since the Congress withdrew common varieties of building stone, sand and gravel from location under the mining laws on July 23, 1955 (30 U. S. C., 1958 ed., sec. 611), it was incumbent upon Coleman to show that all the requirements for discovery of a valuable mineral deposit, including a showing that these materials could have been extracted, removed, and marketed at a profit, had been met by that date. United States v. Fife, et al., (supra).

In view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a "common variety" within the meaning of the act.

It is very clear that Coleman did not make the showing required as to the undeveloped claims which the Acting Director declared to be null and void. Whether expenditures for improvements on other claims may or may not be credited to these claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims in 1955 or even in 1958 when the hearing was held. Coleman presented evidence of sales from the four claims upon which the bulk of his improvements were placed. However, he admitted that he did not make any profit on his rock sales. He testified to estimated removals of rock, not all of which was sold, valued at $15,990. He also testified to labor on the claims (more than 3000 days from 12 to 18 hours in length at

$3.50 per hour) of the value of at least $157,500. (Tr. 116, 117.)[2/] It is not clear that his estimate of the value of his labor included the costs of obtaining and operating the equipment by which it was accomplished; in the absence of an explanation it is reasonable to assume that $3.50 per hour was not intended to cover the use of trucks, bulldozer and blasting equipment. But even if it were possible to amortize the costs of acquiring his heavy equipment, the great disparity between his own estimate of the value of the mineral actually marketed from the claims and the costs of doing so indicates the absence of any element of profit.

The only issue in dispute at the hearing on September 16, 1958, was the existence of a market for profitable sales before July 23, 1955. The testimony of the government's mineral examiner, describing an examination of the claims in Coleman's company and of his sales records, and that of a producer and distributor of stone products, describing the market for rock and stone in southern California, are sufficient to constitute a prima facie showing of invalidity. The burden was upon Coleman to show by a preponderance of the evidence that each of his claims was validated by a discovery of a valuable mineral deposit within its boundaries. Foster v. Seaton, supra. He was required to show that by reason of all pertinent factors, including the existence of a present demand before July 23,

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2/ This reference is to the pages of the transcript of the testimony offered at the hearing.

1955, the deposit upon which his claim of discovery was based could be mined, removed and disposed of at a profit. See United States v. Philip Jungert, A-28199 (April 14, 1960); United States v. Jacobo Armenta et al., A-28248 (June 22, 1960). I am unable to find evidence which supports such conclusion as to any of the claims.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director is affirmed in so far as that decision held 14½ of Coleman's Baldwin Lake quarry mining claims null and void and reversed in so far as it held 3½ of his claims validated by discovery. All of the Baldwin Lake quarry placer mining claims are hereby held to be null and void.

Edward W. Fisher

DEPUTY Solicitor